Supreme Court, U.S.
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No. 94-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WILLIAM L. PATTERSON,

Petitioner,

v.

MATANUSKA MAID, INC., Individually and Severally; and its agents JOHN SEAWELL, RON WILDE, JOE VAN TREECK and STEVE BEVINS, Individually and Severally,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner contends that the decision of the Supreme Court for the State of Alaska erroneously held his state tort claim to be pre-empted by the Labor-Management Relations Act (LMRA) and erroneously held his tort claim and wrongful discharge claim to be time-barred, as reflected in the following questions:

1. Did the Alaska Supreme Court deny due process of law and equal protection of laws in upholding dismissal of the petitioner's claim for libel under state law on the basis that the claim was pre-empted by the LMRA and publication of a defamatory letter was absolutely privileged in a labor controversy?

2. Did the Alaska Supreme Court err in holding that petitioner's suits for defamation and wrongful discharge were time-barred under the LMRA?

OTHER PARTIES

The State of Alaska was named as a party in the state court proceedings. Additional parties were named in the proceeding in the trial court, but no appeal was pursued as to them. Patterson named the defendants "individually and severally" when he was a pro se plaintiff. A related case is still pending in the United States District Court for the District of Alaska, Patterson v. International Brotherhood of Teamsters Local 959, Case No. A94-147-CV (JKS).

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I. STATEMENT OF JURISDICTION

The petitioner respectfully prays that a writ of certiorari be issued to review Opinion No. 4108, dated August 5, 1994 in Case No. S-4125, __ P.2d __, of the Supreme Court of the State of Alaska. See, Appendix at A2 to A34. A timely petition for rehearing was denied on September 2, 1994. See, Appendix at A1.

This court has jurisdiction pursuant to 28 U.S.C. 1257. This petition is timely filed in accord with 28 U.S.C. 2101.

II. APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves rights protected by Amendment XIV, §1 to the United States Constitution, which provides:

> ...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the Labor-Management Relations Act, which, in §301, makes provision for suits by and against labor organizations, 29

U.S.C. 185(a), (b) and (c), which provide:

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgment

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in

> any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

State and federal courts have concurrent jurisdiction of §301 suits. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 1880 n. 2, 100 L.Ed.2d 410 (1988). State as well as federal courts must apply federal law in deciding these claims. Id.

Patterson contends that the statute of limitations applicable to his defamation claim is not the limitation for §301 actions, but rather is the applicable state statute, AS 09.10.070, which provides:

> **Actions to be brought in two years.** No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contact and not specifically provided otherwise; (2) upon a statute for forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penaldy or forfeiture; unless commenced within two years.

III. STATEMENT OF THE CASE

Patterson was employed as a delivery driver-salesman by Matanuska Maid, Inc. (Mat-Maid) from

1979 to 1986.(CR 402, 1100). Mat-Maid began as a cooperative for processing, distributing and marketing dairy products. Difficult financial problems culminated in reorganization of the firm under the Bankruptcy Code in 1984. The Bankruptcy Court allowed the State of Alaska, the major creditor, to take over management of the company (CR 1099). John L. Seawell was appointed managing agent for the state on November 15, 1984 (CR 87). Seawell brought in a new management team, which resulted in events leading to Patterson's discharge on April 30, 1986 (CR 1100).

International Brotherhood of Teamsters Local 959 (Local 959) represented Mat-Maid's employees, but there was no signed collective bargaining agreement (CBA) in effect between Local 959 and Mat-Maid from November 18, 1983 until a new two-year CBA became effective April 1, 1986. During the interim, the employer operated under what it called an implemented last offer agreement, not officially recognized by the union (CR 1099-1100).

Patterson is a United States Army Veteran who, after serving a tour of duty in Vietnam and being honorably discharged, was diagnosed as suffering from Post-Traumatic Stress Disorder (PTSD)(Patterson Depo. at 38, 41, 72-75, 445).[1] Despite the PTSD, Patterson's personnel file contained no documented disciplinary incident prior to June 3, 1985 and management witnesses acknowledged in the arbitration hearing that Patterson ordinarily demonstrated good work habits and was considered a desirable employee (CR 1100, 1103). Between June 3, 1985 and April 30, 1986, Patterson's personnel file contains entries of about a dozen deficiencies, including absent reports, verbal reports regarding load sheets and verbal reports regarding customer contacts, but no formal disciplinary action (CR 1103).

On February 6, 1986, Steve Bevins, Patterson's immediate supervisor, wrote a letter to Robert J. Sinnett, Secretary-Treasurer of

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[1]Patterson's 215-page deposition with exhibits is in the court file (CR 134-369).

Local 959, alleging misconduct by Patterson, including alleged placing of six capsules of Tranxene in Bevins' can of Coca-Cola; late evening abusive telephone calls to Bevins' home while under the influence of alcohol and/or drugs, including name-calling and threats; problems with the battery in Patterson's route truck requiring four jump starts by Bevins in four months, although the battery was new and other drivers had no problems with it; obscene calls at all hours of the day and night to Bevins' home and the home of a non-union employee, including alleged obscenities to spouses, and obscene calls to one of the office girls; customer complaints concerning Patterson's alleged deliberate failure to follow instructions and coverup attempts by Patterson (CR 84-85). Patterson denied the allegations in a letter to Seawell and requested an apology. Patterson also obtained and supplied letters from customers referred to in Bevins' letter, refuting Bevins' allegations (CR 1115-1118), and a repair order

establishes that the truck in question had serious problems with the electrical system (CR 1102, 1113). The office girl referred to in Bevins' letter denied Bevins' allegations at the arbitration hearing (CR 1102) and the company could present only hearsay testimony about alleged calls to Bevins' wife and the wife of the non-union employee (CR 1101).

On April 30, 1986, at the beginning of Patterson's work shift, he drove his company truck to Local 959 headquarters hoping to see Sinnett, the Secretary-Treasurer of Local 959, to express his views about a provision of the CBA, which was still under negotiation (Patterson Depo. at 93, 94; CR 1104). While waiting to see Sinnett, Patterson took a coffee break in the restaurant on the premises and completed his morning paperwork before making his deliveries. After about 20 minutes, Patterson left without seeing Sinnett. While he was stopped at a stop sign at the parking lot exit, his truck was rear-ended by a pickup truck. Patterson's truck

sustained no damage and the other driver was cited for the accident. Shortly after Patterson had completed his deliveries and returned to Mat-Maid, he was given a termination notice by Seawell, the general manager (Patterson Depo. 92, 93; CR 1104). The termination notice stated:

> This is notice of termination of your employment at Matanuska Maid effective immediately.
>
> Reasons for your discharge include:
>
> Unauthorized use of company equipment for personal use.
>
> Gross disobedience.
>
> Second accident within a year involving property damage to others.

(CR 1081). Patterson had been involved in an accident on May 27, 1985, which also was attributable to the other driver (CR 1103).

Local 959 filed a grievance on Patterson's behalf. On June 23, 1986, a hearing was held before an arbitrator to determine if the termination of Patterson was for just cause and, if not, what was the remedy? (CR 1099). On July 2, 1986, the arbitrator made his Decision and Award that

Mat-Maid had just cause to terminate Patterson's employment, dismissing Patterson's grievance (CR 1112). The record does not establish when Patterson was first informed of the arbitrator's decision, but, because the decision is dated July 2, which was a Wednesday, and it was distributed by mail, since Friday, July 4, was a holiday, it appears certain that Patterson did not become aware of the decision until at least Monday, July 7, 1986, possibly later. See, Opinion of the Alaska Supreme Court at A17.

On January 6, 1987, Patterson filed a Complaint for Discrimination in Employment with the United States Department of Labor, Case No. J870004, which was not finally determined until March 11, 1993.

On February 5, 1988, Patterson, pro se, filed a Complaint in the Superior Court for the State of Alaska, Case No. 3AN-88-1093 Civil, against Matanuska Maid, Inc., and its agents John Seawell, Ron Wilde and Steve Bevins, alleging that he had been maliciously defamed by the

publication of Bevins' February 6, 1986 letter to Sinnett and the republication of that letter during the arbitration proceeding (CR 27-32).

On May 2, 1988, Patterson, pro se, filed another Complaint in the Superior Court for the State of Alaska, Case No. 3AN-88-4692, naming the same defendants and, in addition, Joe Van Treeck of Matanuska and Local 959 as defendants (CR 1-12). The Complaint includes allegations that Mat-Maid wrongfully terminated Patterson and Local 959 breached its duty of fair representation. The suit was stayed as to Local 959 because it was in Chapter 11 Bankrutpcy (CR 24-25). Upon motion of Mat-Maid, the court ordered the two cases consolidated on November 21, 1988 (CR 47-48).

On February 6, 1989, Patterson, still acting pro se, added the State of Alaska as a defendant (CR 982-985, 1004-1005).

On April 14, 1989, Mat-Maid filed a motion for summary judgment asserting that Patterson's claims were pre-empted by §301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185,

and that all of Patterson's claims were time-barred by the six-month limitation of action applicable to §301 causes of action (CR 76-90). The Superior Court granted Mat-Maid's motion for summary judgment against all of Patterson's claims on June 19, 1989 (CR 524-525) and entered final judgment in favor of Mat-Maid and its agents on August 10, 1989 (CR 562-563). The Superior Court had granted summary judgment to the state on May 1, 1989 (CR 1143-1144).

On November 4, 1992, the Alaska Supreme Court granted Patterson the right to file a late appeal (CR 1150-1152).

The Alaska Supreme Court issued its Opinion affirming the Judgment on August 5, 1994 (Appendix at A2 to A34) and denied a timely petition for rehearing on September 2, 1994 (Appendix at A1).

IV. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

A. Patterson's Defamation Claim Was Not Pre-empted by the Labor Management Relations Act.

Patterson asserted his tort claim for defamation based on the publications of the February 6, 1986 letter from Bevins to Sinnett in state court under state law. Torts asserted pursuant to state law are pre-empted by §301 of the LMRA only when they conflict with federal law or would frustrate the federal scheme, or when the court discerns from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209, 105 S.Ct. 1904, 1910, 85 L.Ed.2d 206 (1985). See, also, United Steel Workers of America v. Rawson, 495 U.S. 362, 369, 110 S.Ct. 1904, 1909, 109 L.Ed.2d 362 (1990); Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1540-41 (9th Cir. 1992). A state cause of action is not pre-empted if it confers non-negotiable state-law rights on an employee independent of

any right established under a CBA. Allis-Chalmers, 471 U.S. at 213, 105 S.Ct. at 1912. If evaluation of the tort claim is not inextricably intertwined with consideration of the terms of a labor contract, it is not pre-empted. Id. The nature of the state tort is a matter of state law, but the question of whether the tort is sufficiently independent of federal contract interpretation to avoid pre-emption is a question of federal law. 471 U.S. at 214, 105 S.Ct. at 1912.

In Allis-Chalmers, the tort involved was alleged bad faith in adjusting an insurance claim which derived from the implied covenant of good faith and fair dealing in the CBA. Since the tort was intrinsically related to the nature and existence of the contract and rooted in the expectations of the parties that must be evaluated by federal contract law, it was held to be preempted. 471 U.S. at 216-220, 105 S.Ct. at 1914-16.

The tort asserted by Patterson in his Complaint dated February 5, 1988, however, was en-

tirely independent of any CBA. It did not derive from any rights or obligations established by the contract, nor did it require interpretation or application of any of the terms of the CBA.

Mat-Maid contended that the publications of the Bevins letter were absolutely privileged because it had been its regular custom and practice to informally confer with the union on labor issues to prevent them from becoming serious labor disputes (CR 427). Mat-Maid asserted that it was operating under an implemented last offer agreement at the time of the initial publication of the letter, but it never disclosed in the record any of the terms of the alleged implemented agreement. At the time the letter was published at the arbitration hearing, a new CBA was in effect, and Mat-Maid asserted that the preamble (Article 1.01) and Articles 9.01 and 9.02 provided for informal conferences and conciliation and direct communication of complaints by the employer to union representatives apart from initiation of formal grievance proceedings

(CR 426). The pertinent portion of Article 1.01 states, "The purposes of this Agreement are to provide for the settlement of labor disagreements by conference..." (CR 92). Article 9.01 is merely a general statement of the intent of the parties to follow the procedures stated thereafter in the orderly and peaceful resolution of disputes (CR 97). Article 9.02 states:

> Any dispute that arises between the employee and the employer or any complaint or grievance on the part of both or one, said grievance, complaint or dispute shall be submitted to the Local Union within thirty (30) days to be eligible to receive assistance of the Local Union.

(CR 97). Articles 9.03 through 9.11 specify the procedures for bringing a grievance, complaint or dispute and the arbitration thereof, but there is no provision for Mat-Maid to file a dispute, complaint or grievance without seeking arbitration (CR 97-98).

The Bevins letter did not seek arbitration, nor did it give notice of any suspension or termination. When Patterson was terminated on April 30, 1986, the termination notice neither

referred to the February 6, 1986 letter nor anything stated in that letter.

In Tellez v. Pacific Gas & Electric Company, Inc., 817 F.2d 526, 538 (9th Cir. 1987), cert. denied, 108 S.Ct. 251, the court stated, "One can sue for defamation regardless of employment status or union membership." That case involved a suspension letter which alleged that the employee had been observed to purchase cocaine from another employee. The Court of Appeals stated further:

> The agreement (the CBA) simply does not govern Bain's allegedly defamatory conduct. It neither requires management to send written notice of suspension nor provides guidelines in the event such notice is sent. Thus, Bain could not have been acting under the terms of the collective bargaining agreement when he sent the suspension letter. It follows that the resolution of Tellez's defamation claim does not require interpretation or consideration of the agreement.
>
> ...We therefore conclude that permitting Tellez's state defamation claim to proceed does not impinge on the authority of the arbitration process contemplated by the parties' collective bargaining agreement.

(Footnotes omitted). 817 F.2d at 538. The Court of Appeals then distinguished the Tellez case from the cases cited by the Alaska Supreme Court in support of its holding that the publication of Bevins' letter was absolutely privileged. (Appendix, A32). The same distinguishing factors apply to this case. In fact, this case is even further removed from the labor contract than Tellez because in that case the defamatory letter was a "suspension letter," whereas here the letter did nothing whatsoever to invoke or cause the invocation of the CBA. Consequently there is no basis for pre-emption of Patterson's defamation claim and, likewise, there is no basis for any privilege to attach to the defamatory statements in the context of the LMRA.

Furthermore, Patterson asserted in his Complaint that the defamatory statements were made with malice and were either deliberately or recklessly untruthful. Even in the labor relations context, such statements enjoy no constitutional protection and cannot be condoned.

Linn v. United Plant Guard Workers of America Local 114, 363 U.S. 53, 63, 86 S.Ct. 657, 663, 15 L.Ed.2d 582 (1966). A cause of action based on such libelous statements is not pre-empted. 383 U.S. at 64, 86 S.Ct at 663-664.

By holding that Patterson's state tort claim for defamation was pre-empted by the LMRA and that the publications of the Bevins letter were privileged as though they were in the context of a labor dispute, the Alaska Supreme Court erroneously deprived Patterson of his day in court and in reality denied him equal protection of laws and also deprived him of his property (his cause of action) without due process of law. Patterson is entitled to litigate his claim and have it decided by a jury of his peers.

B. Patterson's Claims Should Not Be Time-Barred Under the Labor-Management Relations Act.

In applying for summary judgment as to Patterson's claims for defamation and wrongful termination, after the two lawsuits were consolidated, Mat-Maid took the position that all claims

were encompassed in a hybrid §301/Fair Representation action, which is a dual action against the union for breach of its duty of fair representation implied under the LMRA and against the employer for breach of the CBA. See, DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164, 103 S.Ct. 2281, 2290, 76 L.Ed.2d 476 (1983). A six-month limitation period is applied to such claims. DelCostello, 462 U.S. at 169-170, 103 S.Ct. at 2293-94.

Assuming the six-month limitation is applicable, the record in this case is unclear as to when it began to run. It is clearly established that the limitation period does not begin to run until the employee learns of the arbitrator's decision. Galindo v. Stoody Co., 793 F.2d 1502, 1509 (9th Cir. 1986). Other court decisions confirm that such a hybrid cause of action does not accrue and the six-month statute of limitations does not begin to run until the employee discovers that the union will take no further action on his grievance. Daniels v. Pipefitters

Association Local Union No. 571, 945 F.2d 906, 922 (7th Cir. 1991); Harris v. Alumax Mill Products, Inc., 897 F.2d 400, 404 (9th Cir. 1990). In this case, the arbitrator's decision is dated July 2, 1986 and it was mailed by the arbitrator to the union representative. Since July 2 in 1986 was a Wednesday, it appears that Patterson could not have been informed before the July 4th holiday on Friday, so the only fair inference is that Patterson did not know about it until at least Monday, July 7, 1986. Thus, the record is sufficient to establish that the limitation could not have begun to run before that date, but it is insufficient to determine exactly when Patterson was informed that the union would take no further action on his grievance. Moreover, Patterson has never conceded that the six-month limitation applied to his defamation claims.

1. Patterson's Complaint for defamation was timely under the applicable statute of limitations.

As shown previously, Patterson's Complaint

for defamation is a tort under state law and it should not have been pre-empted by the LMRA. The applicable statute of limitations is two years as provided by AS 09.10.070, quoted supra at 3-4.

2. The limitation period on Patterson's § 301 claims was tolled.

In DelCostello, 462 U.S. at 172, 103 S.Ct. at 2295, this court remanded for a determination as to whether the six-month limitation period had been tolled, thereby recognizing that tolling may be applicable in such cases. Statutes of limitations are not jurisdictional, so they are subject to waiver and tolling when equity so requires. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398, 102 S.Ct. 1127, 1135, 71 L.Ed.2d 234 (1982). In deciding whether to toll a limitation period, "[t]he ultimate question is one of the congressional intent 'whether tolling the limitation in the given context is consonant with the legislative scheme.'" Whittaker v. Whittaker Corp., 639 F.2d 516, 527 (9th Cir. 1982), cert. denied, 454 U.S.

1031 (1981), quoting, American Pipe and Construction v. Utah, 414 U.S. 538, 558, 94 S.Ct. 756, 768, 38 L.Ed.2d 713 (1974).

Patterson's cause of action accrued sometime after July 7, 1986, but the record does not establish exactly when it accrued. Patterson filed a complaint for wrongful termination with the Department of Labor on January 6, 1987, which appears certainly to have been within six months of the accrual of his cause of action. Because Patterson was without employment and, consequently, representing himself, the record in this case contains very little information about the nature and progress of his complaint to the Department of Labor, although he testified briefly about it in his deposition (Patterson Depo. at 46-47). Summary judgment was granted against Patterson on the basis of a statute of limitations without anything in the record establishing when the limitation period began to run and little information to indicate whether it should have been tolled.

This court has consistently recognized that time requirements in lawsuits are customarily subject to equitable tolling. See case citations in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, __ U.S. __, 111 S.Ct. 2773, 2782 (1991).

At the time Patterson's hybrid §301 cause of action accrued, the applicable law to be considered, if Patterson as a prospective pro se litigant was able to find and apply the law, was that a six-month limitation period applied and it could be tolled in a context consonant with the legislative scheme. In Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983), the court had explained:

> Equitable tolling should not be applied in a manner that frustrates national labor-management policy. We believe that policy is fostered by the NLRB attempt to resolve an issue before a party resorts to a §301 action. Thus, if tolling is appropriate in this case, it would not be inconsistent with the Constitution or with the applicable federal labor laws.

It also had been established that where a

plaintiff adopts a single course of action which is dismissed or otherwise fails, courts generally allow the plaintiff to pursue a second remedy based on the same right or claim, tolling the limitations period during the pendency of the initial defective action. Nelson v. International Paint Company, 716 F.2d 640, 645 (9th Cir. 1983). In order to establish that tolling should apply, a plaintiff had to show that his pursuit of the initial remedy gave notice to the defendant of the existence of a legal claim against it, the defendant must not be prejudiced in its ability to gather evidence by the bringing of the second claim, and the plaintiff must have acted in good faith. Jackson v. Hayakawa, 605 F.2d 1121, 1127 (9th Cir. 1979), cert. denied, 445 U.S. 952 (1980). Not until after Patterson had elected to file his wrongful discharge claim with the Department of Labor did the Ninth Circuit Court of Appeals pronounce that the filing of an optional NLRB action did not toll the limitation for the filing of a §301 claim. Conley v.

International Brotherhood of Electrical Workers, Local 639, 810 F.2d 913, 916 (9th Cir. 1987). In doing so, the court stated, "Allowing tolling in this circumstance would frustrate the national policy of prompt resolution of labor disputes," which was exactly the opposite of what the same court had said in Hub Pharmacy, supra. Furthermore, in DelCostello, this court indicated at least as much concern about a limitation period being too short as too long. 462 U.S. at 167-8, 103 S.Ct. at 2292.

In Conley, the court made the illogical pronouncement that, "Equitable tolling is most appropriate when plaintiff is required to avail himself of an alternate course of action as a precondition to filing suit." 810 F.2d at 915. But equitable tolling does not apply when an alternate course of action is a precondition to filing suit, because a cause of action does not accrue until preconditions have been exhausted. Daniels v. Pipefitters Association Local Union No. 597, 945 F.2d 906, 922 (7th Cir. 1991). In

Eichman v. Fotomat Corp., 880 F.2d 149, 155 (9th Cir. 1989), a different panel, without reference to Conley, explained:

> Equitable tolling applies when the plaintiff seeks a different remedy for the same wrong. However, equitable tolling is not applicable when a plaintiff has pursued a remedy as to only one of several distinct wrongs.

The first sentence of this pronouncement is applicable in Patterson's case. The second sentence was applicable in Harris v. Alumax Mill Products, Inc., 897 F.2d 400 (9th Cir. 1990) in which the court held that a §301 claim was not tolled by the filing of a worker's compensation claim. Without reference to Eichman, the Harris court unnecessarily relied on the illogical pronouncement in Conley. Harris, 897 F.2d at 404.

In Harris, the court also relied on this court's decision in International Union of Electrical, Radio and Machine Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 236-40, 97 S.Ct. 441, 446-49, 50 L.Ed.2d 427 (1976). In that case, a majority of this court analyzed the applicability of tolling the limitation period

for filing a Title VII claim under the Civil Rights Act of 1964 while pursuing a grievance of a discharged employee under the applicable collective bargaining agreement. The majority of the court concluded that the Title VII time limitation was not tolled. But that conclusion appears to be limited to that specific legislation in which Congress emphasized the existence and independence of the two remedies. 429 U.S. at 237, 97 S.Ct. at 447. There is no similar emphatic expression of congressional intent applicable in this case. Even so, in Robbins & Myers, four members of this court, as then constituted, declined to join in that part of the opinion, but concurred in the result on the basis that Congress had lengthened the limitation period after the cause of action had initially accrued and the new limitation was applicable.

Although, as has been noted, all members of this court appear consistently to have recognized the desirability of the doctrine of equitable tolling of limitation periods, how and under what

circumstances tolling and related concepts are to be applied has resulted in many differences of opinion among the members of this court. For example, in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, supra, there are five different opinions, with only four members of the court joining in all of the main opinion. Justice Stevens, in his opinion, recognized that the traditional rule of borrowing from analogous state limitations is often chaotic, but he said it would still be preferable for Congress, rather than the court, to legislate any change. 111 S.Ct. at 2784. But the pithy comments of Justice O'Connor are more applicable to this case. She wrote:

> In holding that the respondents' suit is time-barred under a limitation period that did not exist before today, the Court departs drastically from our established practice and inflicts an injustice on the respondents.

111 S.Ct. at 2785. Justice O'Connor continued:

> Notwithstanding respondents' entirely proper reliance on this limitations period, the Court now holds that their suit must be dismissed as untimely because respondents did not comply with a federal limitations

> period announced for the first time today--four-and-one-half years after the suit was filed. Quite simply, the Court shuts the courthouse door on respondents because they were unable to predict the future.

111 S.Ct. at 2786. Although the facts of this case are somewhat different, the essential facts are analogous. At the time Patterson, pro se, elected to pursue his claim administratively with the Department of Labor, the law appeared to be clear that doing so would toll the limitations period applicable to his §301 claims. But now, the state courts have shut the courthouse door on Patterson because he was unable to predict the future. As Justice Kennedy commented,

> That (looking to limitations periods Congress established under the Act) does not relieve us, however, of our obligation to reject a limitations rule that would "frustrate or significantly interfere with federal policies."

111 S.Ct. at 2788. Federal policies at the time Patterson was determining his course of action favored a party attempting to resolve an issue administratively before resorting to a §301 action. Retail Clerks Union Local 648 v. Hub

Pharmacy, 707 F.2d at 1033.

V. CONCLUSION

Patterson has been denied due process of law as to his state tort action by unwarranted pre-emption of it into his §301 cause of action; and he has been denied due process of law as to his §301 cause of action by the application of concepts of tolling the limitation period which did not exist at the time Patterson's cause of action accrued.

This court is urged to grant a writ of certiorari so that this case may be considered on the merits and then to determine that the Judgment of the Alaska Supreme Court should be reversed.

Respectfully submitted the 21 day of November, 1994.

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Case Title: PATTERSON V MATANUSKA MAID INC
Suprem Court Case #: S4125

***** O R D E R ****** 09/01/94

IT IS ORDERED: THE PETITION FOR REHEARING FILED ON AUGUST 15, 1994. IS DENIED. ENTERED AT THE DIRECTION OF THE SUPREME COURT ON SEPTEMBER 1, 1994.

CC: JUSTICES, JUDGE HUNT, APPEALS DIVISION 3AN-88-1093 CIVIL. PUBLISHERS (OP#4108. 8/5/94). TRW

Clerk of the Appellate Courts

THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM J. PATTERSON, Appellant, v. STATE OF ALASKA, DEPARTMENT OF AGRICULTURE, Individually and Severally; MATANUSKA MAID, INC., Individually and Severally; and its agents JOHN SEAWELL, RON WILDE, STEVE BEVINS and JOE VAN TREECK, Individually and Severally, Appellees.	) Supreme Court) No. S-4125) Superior Court No.) 3AN-88-1093 CI) O P I N I O N) [No. 4108 - August 5, 1994]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen L. Hunt, Judge.

Appearances: A. Lee Petersen, Law Offices of A. Lee Ptersen, P.C., Anchorage, for Appellant. Parry Grover, James H. Juliussen, Davis Wright Tremaine, Anchorage, for Appellees Matanuska Maid, John Seawell, Ron Wilde, Steven Bevins, and Joe Van Treeck. Kevin Saxby, Assistant Attorney General, Anchorage, Charles E. Cole, Attorney General, Juneau, for Appellee State of Alaska.

Before: Moore, Chief Justice, Rabinowitz, Matthews and Compton, Justices. [Burke, Justice, not participating.*]

RABINOWITZ, Justice.

* Justice Burke participated in oral argument but retired from the court before the opinion was rendered.

I. INTRODUCTION

William Patterson initially sued Matanuska Maid and its agents (Mat-Maid) for defamation. Patterson then filed a second lawsuit against the State of Aalska, Department of Agriculture (State) and Mat-Maid for wrongful termination. Patterson now appeals from the superior court's grant of summary judgment in favor of the State and Mat-Maid on both claims.

II. FACTS AND PROCEEDINGS

Patterson had been employed by Mat-Maid for seven and one-half years, during which time the company came under new management. Mat-Maid had experienced financial difficulties, and the federal bankruptcy court ordered reorganization. The bankruptcy court authorized the State to operate the company, and a new managing agent, John Seawell, was appointed in November 1984.

Patterson was involved in an accident with a company truck in June 1985. He was reprimanded, and a corrective action report was placed in his file. This incident, coupled with the change in

management and Patterson's problems associated with post-traumatic stress disorder,[1] appear to have triggered a series of absences from work, customer complaints about Patterson, and reprimands regarding his performance of routine duties. Mat-Maid took no formal disciplinary action against Patterson for any of these reported incidents.

Starting in April 1986, a collective bargaining agreement between Mat-Maid and Teamsters Local 959 controlled Patterson's terms of employment.[2] The agreement required "just cause" for termination of employment and also

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[1]Patterson is a Vietnam veteran who has been diagnosed as suffering from post-traumatic stress disorder. His psychotherapist states that as a result of his war experiences Patterson has "experienced a great deal of problems in his relationships with supervisors in his work over the years." It appears that after the change in management "the relationship between Mr. Patterson and his supervisors became very adversarial."

[2]Before the collective bargaining agreement went into effect, Mat-Maid looked to an employer-implemented last offer agreement, which Local 959 had never endorsed, to govern relations with employees.

contained mandatory grievance and arbitration procedures.[3]

On February 6, 1986, Steve Bevins, Patterson's immediate supervisor, wrote a letter to the secretary-treasurer of Local 959, Robert J. Sinnett, asserting misconduct by Patterson. Bevins alleged that Patterson tried to poison him and that Patterson was calling his home making obscene remarks to his spouse. The letter also said that Patterson made obscene calls to other employees, and that Bevins was concerned about Patterson's stability and performance. Essentially, the letter asked Local 959 to intervene and attempt to straighten out the situation, and stated that if problems with Patterson's behavior continued, he would be fired.

Patterson was subsequently involved in a second automobile accident on April 30, 1986. At the time of the accident Patterson had detoured

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[3]The agreement specified that the procedures therein would be "the sole means of resolving disputes, complaints, or grievances." Under these procedures, arbitration would be a last resort.

without permission from his delivery route. He drove to the Teamsters Building in an attempt to gain Sinnett's permission to attend a meeting between Local 959 and Mat-Maid. As he left the parking lot a pick-up truck collided with the rear of his delivery truck. Patterson was terminated for cause that same day.

Patterson subsequently filed a termination grievance, which Local 959 took to arbitration on his behalf. An arbitration hearing was held and on July 2, 1986, the arbitrator rendered a decision and award in favor of Mat-Maid. Neither Patterson nor Local 959 appealed from the arbitration decision.

On February 5, 1988, Patterson file a pro se tort action for defamation against Mat-Maid. On May 2, 1988, Patterson filed a second lawsuit for wrongful termination against Mat-Maid, Local 959 and its officers, and the arbitrator. Both actions were based on the conduct of Mat-Maid and Local 959 during Patterson's employment and the subsequent grievance proceedings. According to

Patterson's complaint, the arbitrator "admitt[ed] unsubstantiated, irrelevant, and grossly hearsay evidence," sustained Patterson's termination on grounds other than those charged, "overstepp[ed] his bounds," and "ignor[ed] his duty as an impartial judge." The two cases were subsequently consolidated by superior court order. On February 6, 1989, Patterson filed a document titled "Addition to Plaintiff's List of Defendants in Above Mentioned Cases," in which for the first time he named the State as a defendant in the now consolidated lawsuits. The State and Mat-Maid thereafter filed separate summary judgment motions.

The superior court granted summary judgment in favor of the State in May 1989, on the grounds that Patterson had not named the State as a party until after the statute of limitations for wrongful discharge and defamation had run. The superior court also held that Patterson's claim against the State did not relate back to the date of his original complaints, see Alaska R. Civ. P.

15(c), because he was not mistaken as to the identity of the proper party.[4]

Without comment, the superior court granted summary judgment in favor of Mat-Maid in June 1989. The court entered final judgment in favor of Mat-Maid on August 10, 1989. Now represented by counsel, Patterson appeals from the grants of summary judgment to the State and Mat-Maid.[5]

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[4]All claims against Local 959's officers were dismissed by superior court order in August 1988. The superior court on that date also ordered a stay of proceedings against Local 959 pursuant to the United States Bankruptcy Code, 11 U.S.C. § 362. In September, the superior court additionally dismissed all claims against the arbitrator.

[5]In Patterson v. State, Mem. Op. & J. No. 0642 (Alaska Nov. 4, 1992), this court granted Patterson leave to file a late appeal from the superior court's final judgment of August 10, 1989. The State now contends that because Patterson did not explicitly appeal the superior court's May 1, 1989 grant of summary judgment to the State, he cannot challenge that judgment here. The superior court's judgment was titled "Order Granting Final Summary Judgment," and the State now characterizes this determination as a proper final judgment.

The State is mistaken. If an action involves multiple claims or multiple parties, and some claims are adjudicated before others, then no appeal may be taken until the court has disposed of the entire case on all substantive issues,

III. DISCUSSION

A. Standard of Review

"When reviewing an appeal from summary judgment, we determine whether there was a genuine issue of material fact before the trial court, and whether the moving party was entitled to judgment on the law applicable to the established facts." Crissey v. Alaska USA Fed. Credit Union, 811 P.2d 1057, 1059 (Alaska 1991).

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except as provided under Alaska Civil Rule 54(b). See Johnson v. State, 577 P.2d 706, 709-10 (Alaska 1978). Rule 54(b) allows the entry of final judgment "as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The superior court's order of May 1, 1989 contained no such explicit findings.

Therefore, no appeals could occur until final disposition of the action on August 10, 1989, with the entry of final judgment as to Mat-Maid. The time for filing an appeal on any of Patterson's claims started at that time. Under these circumstances, we read our grant of permission to file a late appeal as an extension of the time to appeal all claims. Whether Patterson mentioned the judgment of May 1, 1989 in his motion to file a late appeal is not a relevant consideration.

B. Patterson's Wrongful Termination Claim and the Applicable Period of Limitations

An arbitrator's decision can only be challenged in two ways: (1) collaterally in an action alleging breach of contract against an employer and breach of the duty of fair representation against a union; or (2) directly through an action to vacate the award. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976); see also Sine v. Local No. 992 Int'l Bhd. of Teamsters, 644 F.2d 997 (4th Cir.) (addressing and analyzing both employee's direct challenge to arbitrator's decision and employee's claim for union's breach of duty), cert. denied, 454 U.S. 965 (1981). We turn first to the issues pertaining to Patterson's collateral attack on the arbitrator's decision.

1. The Applicable Limitations Period for § 301 Hybrid Claims

Patterson attempts to characterize his May 2, 1988 wrongful termination suit as a hybrid action that federal law authorizes when a labor

union breaches its duty to fairly represent an employee in arbitration proceedings. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983). Brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185,[6] this action is both a suit against the employer for breach of a collective bargaining agreement, and a suit against the union for breach of the duty of fair representation. DelCostello, 462 U.S. at 164-65; see also Vaca v. Sipes, 386 U.S. 171, 186-87 (1967). State courts have concurrent jurisdiction to hear a collective bargaining suit presenting § 301 hybrid claims. Vaca, 386 U.S. at 186-87. See generally John P.

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[6]This statute states in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

Ludington, Annotation, State Court Jurisdiction as Pre-empted by National Labor Relations Act as Amended (29 U.S.C.S. §§ 141 et seq.)--Supreme Court Cases, 75 L.Ed.2d 988, 1012-13 (1985) (discussing lack of pre-emption in § 301 cases). However, state courts must apply federal substantive law in adjudicating § 301 actions.[7]

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[7]The U.S. Supreme Court requires application of federal law alone in order to ensure uniform interpretation of collective bargaining agreements and to promote the peaceful and consistent resolution of disputes between labor and management:

> The dimensions of § 301 require the conclusions that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated ... requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.
>
> More important, the subject matter of § 301(a) "is peculiarly one that calls for uniform law." The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements .... Indeed, the existence of possibly conclicting legal concepts might substantially impede the parties' willngness to agree to contract terms providing for final arbitral or

Patterson's action is a § 301 action even though he seeks to vindicate "uniquely personal" rights related to his claim for wrongful discharge. See Hines, 424 U.S. at 562.

As a threshold issue, both Mat-Maid and the State contend that Patterson raises § 301 claims for the first time on appeal and that this court

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> existence of possibly conclicting legal concepts might substantially impede the parties' willngness to agree to contract terms providing for final arbitral or judicial resolution of disputes.
>
> ... The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.... [W]e cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

Local 174, Teamsters of Amer. v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962)(citations omitted); accord Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 403 & n. 2 (1988). See generally 2 The Developing Labor Law 1556-59 (Charles J. Morris ed., 2d ed. 1988)(discussing applicability of preemption doctrine to fair representation cases under § 301).

record indicates that Patterson indeed failed to make a § 301 argument to the superior court.

The State and Mat-Maid presented separate defenses before the superior court, and do not present a common defenses on appeal. In the proceedings below, the State responded to Patterson's wrongful discharge and defamation claims without discussing any aspect of federal labor law. However, in its memorandum in support of its summary judgment motion, Mat-Maid raised several arguments concerning the applicability of § 301 to Patterson's claims. Thus, § 301 issues were before the superior court.[8]

The statute of limitations for hybrid § 301 claims is six months. DelCostello, 462 U.S. at 170-72.[9] However, the statute of limitations

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[8]Patterson's § 301 claim against the State is meritless. As used in the Labor Management Relations Act, the term "employer" does not include states or their political subdivisions. 29 U.S.C. § 152(7).

[9]DelCostello borrowed the statute of limitations for making charges of unfair labor practices to the National Labor Relations Board. See 29 U.S.C. § 160(b); DelCostello, 462 U.S. at 169.

begins to run not on the date of the arbitrator's decision but on the date that the employee learns of the arbitrator's decision. Galindo v. Stoody Co., 793 F.2d 1502, 1509 (9th Cir. 1986).[10] Patterson contends that Mat-Maid never established in the record the exact date on which he became aware of the decision, and that thus a genuine issue of material fact exists that precludes summary judgment.

Patterson, however, does not produce evidence that establishes a specific date from which the limitation period should run.[11]

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[10]The Galindo court said that "in a duty of fair representation case, the six-month period generally beings to run when an employee knows or should know of the alleged breach of duty of fair representation by a union." Id.

> Similarly, where a duty of fair representation suit seeks to overturn an unfavorable arbitration award on the ground that the union committed errors in the arbitration proceedings, the claim accrues when the employee learns of the arbitrator's award.

Id.

[11]See Bauman v. State, Div. of Family & Youth Servs., 768 P.2d 1097, 1099 (Alaska 1989) ("Once the movant has met that initial burden [establishing the absence of genuine issues of material

Moreover, contrary to Patterson's allegations, Mat-Maid in fact specified a date when the limitations period started to run. In its memorandum in support of its summary judgment motion, Mat-Maid contended that the statute of limitations started to run no later than July 2, 1986, the date of the arbitrator's decision.

Further, the record indicates that Patterson knew or should have known of the arbitrator's decision no later than July 21, 1986. On July 21, 1986, Mat-Maid appealed a decision by an Employment Security Division hearing officer that Patterson was entitled to unemployment compensation from May 4, 1986. The Commission of Labor based his decision only on the evidence presented to the hearing officer. That evidence included the arbitrator's award upholding Patterson's

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fact], 'the non-movant is required, in order to prevent summary judgment, to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists.'") (quoting State, Dep't of Highways v. Green, 586 P.2d 595, 606 n.32 (Alaska 1978)).

discharge. Because Patterson participated in that unemployment compensation proceeding, he must have known of the arbitrator's decision by the time of Mat-Maid's appeal on July 21, 1986. Furthermore, Patterson's counsel "assumes" that Patterson may have learned of the arbitrator's decision on or about July 7, 1986.

Patterson filed his complaint for defamation on February 5, 1988 and his wrongful termination claim May 2, 1988, both over one and one-half years after the July 2, 1986 arbitration award. We therefore conclude that Patterson's § 301 suit for wrongful termination is time barred, since it was not brought within six months of the time Patterson knew or should have learned of the arbitrator's July 2, 1986 decision.

Patterson also claims that the applicable limitation period should have been equitably tolled while he pursued quasi-judicial relief. Patterson filed a complaint with the U.S. Department of Labor on January 16, 1987. Patterson contends that if he learned of the

arbitrator's decision on or around July 7, 1986 and then filed his complaint with the Department of Labor within six months of that date, then a genuine issue of fact exists as to whether the applicable limitaitons period was tolled.

In countering Patterson's argument, Mat-Maid relies on Harris v. Alumax Mill Products, Inc., 897 F.2d 400, 404 (9th Cir.), cert. denied, 498 U.S. 835 (1990), where the court cited authority to the effect that an employee's § 301 claim is not tolled by virtue of the filing of a worker's compensation claim. The Ninth Circuit concluded "that to allow tolling when the filing of an NLRB claim was merely optional would 'frustrate the national policy of prompt resolution of labor disputes.'" Id. (quoting Conley v. International Bhd. of Elec. Workers, 810 F.2d 913, 916 (9th Cir. 1987)).

The Harris court stated that "'[e]quitable tolling is most appropriate when the plaintiff is required to avail himself of an alternate course of action as a precondition to filing suit.'" Id.

(quoting Conley, 810 F.2d at 916). Additionally, Harris relies on the reasoning of the U.S. Supreme Court regarding the tolling of a statute of limitations by the filing of an optional claim, stating that "[t]he Court has made it clear that it is reluctant to invoke tolling where a plaintiff is tardy in pursuing a parallel avenue of relief." Id. (citing International Union of Elec., Radio, & Mach. Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 236-40 (1976)). We conclude that Patterson's filing of a claim with the U.S. Department of Labor was not a precondition to the filing of his § 301 suit against Mat-Maid, and that the applicable six-month limitation period was not tolled by the filing of that claim.[12]

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[12]Noting that Local 959 has filed for bankruptcy and had obtained a stay of Patterson's suit against it during that time, Patterson also contends that Local 959 was an indispensable party, and that the limitations period thus was tolled for the duration of the stay. He is mistaken. Except in unusual circumstances, an automatic bankruptcy stay under 11 U.S.C. § 362(a) applies to the debtor alone and not to non-bankruptcy co-defendants. E.g., Cushman & Wakefield, Inc. v. Backos, 129 B.R. 35, 36 (E.D.

Pa. 1991). Therefore, severance of the bankruptcy defendant from non-bankrupt co-defendants is allowable unless the bankrupt defendant is indispensable to the action. Id. Patterson acknowledges this rule. He also acknowledges that in a hybrid § 301 action, neither the employer nor the union is typically an indispensable party in an action against the other, because generally the suit against the employer is for breach of the collective bargaining agreement, whereas the suit against the union for breach of the duty of fair representation. See Kaiser v. Local No. 83, 577 F.2d 642, 644 (9th Cir. 1977).

Nonetheless, Patterson contends that Local 959 is an indispensable party, because his claim against Mat-Maid is not only for breach of the collective bargaining agreement, but also for conspiring with the union agaiinst Patterson. Patterson does not discuss why the union might be an indispensable party under Alaska Civil Rule 19 or the parallel federal rule. The sole authority on which Patterson relies is an unsupported dictum from Kaiser that an employer is not a participant in the union's breach of duty "unless, of course, the employee alleges that his union and his employer conspired against him." Id.

Patterson's arguments must fail. In order for one member of a civil conspiracy to be liable, not all members of the conspiracy need be named defendants or be joined as defendants. E.g., U.S. Indus., Inc. v. Touch Ross & Co., 854 F.2d 1233, 1251 (10th Cir. 1988); Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 8 (9th Cir. 1963), cert. denied, 385 U.S. 976 (1966); Non-Ferrous Metals, Inc. v. Saramar Aluminum Co., 25 F.R.D. 102, 104 (N.D. Ohio 1960); 16 Am.Jur.2d Conspiracy § 66 (1979).

2. Applicable Limitations Period for a Direct Attack on the Arbitrator's July 2, 1986 Award

Because his suit concerns the alleged violation of a contract between an employer and a labor organization, Patterson's direct challenge to the arbitrator's decision, like his claims against Mat-Maid and Local 959, falls under § 301, and state courts thus must apply federal law. See United Steelworkers of Amer. v. Northwest Steel Rolling Mills, Inc., 324 F.2d 469, 481 & n.2 (9th Cir. 1963) (addressing action to enforce arbitration award); Safeway Stores v. Brotherhood of Teamsters Local No. 70, 147 Cal. Rptr. 835, 838 (Cal. App. 1978) (addressing action to vacate arbitration award). Thus as a threshold issue we must address the limitations period that applies to such a direct attack.

If Congress does not supply an express statute of limitations regarding enforcement of a federal cause of action, courts must first look to state law for an analogous rule of timeliness. Reed v. United Transp. Union, 488 U.S. 319, 323

(1989); Posadas de Puerto Rico Assocs., Inc. v. Asociacion de Empleados de Casion de Puerto Rico, 873 F.2d 479, 480 (1st Cir. 1989). However, a narrow exception to this rule exists where adoption of state statute of limitations would frustrate or hinder the carrying out of federal policy. Reed, 488 U.S. at 324; Posadas, 873 F.2d at 480. DelCostello gives a two-factor test for determining when the exception applies:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

462 U.S. at 172; accord Reed, 488 U.S. at 324.

Applying such an analysis, the DelCostello court concluded that a six-month limitations period would be appropriate as to both union and employer in hybrid § 301 actions involving a union's breach of the duty of fair representation.[13]

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[13] Ordinarily, the federal statute of limitations for a motion to vacate, modify, or correct an arbitration award is three months after the filing or delivery of the award. 9 U.S.C. § 12.

462 U.S. at 155, 169-70. The Court contrasted the employee's claim with an action to vacate an arbitration award in a commercial context:

> The main difference is that a party to commercial arbitration will ordinarily be represented by counsel or, at least, will have some experience in matters of commercial dealings and contract negotiation. Moreover, an action to vacate an commercial arbitral award will rarely raise any issues not already presented and contested in the arbitration proceeding itself. In the labor setting, by contrast, the employee will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial mattersthat were not at issue in the arbitration proceeding, and to frame his suit. Yet state arbitation statutes typically provide very short times in which to sue for vacation of arbitration awards.

However, the federal arbitration statutes do not apply to contracts of employment, such as collective bargaining agreements, see id. § 1; United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987), and most of the federal circuits, including the Ninth Circuit, reject the limitations period found in 9 U.S.C. § 12. See Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261, 912 F.2d 608, 612-13 (2d Cir. 1990)(summarizing case authority); San Diego County Dist. Council of Carpenters v. Cory, 685 F.2d 1137, 1141 (9th Cir. 1982).

Id. at 165-66.[14]

However, Patterson's case presents a situation unanticipated in DelCostello, because here the state limitations period for challenging the arbitrator's award is potentially far longer than the six-month period borrowed in DelCostello.

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[14]In contrast, if a union raises a suit directly challenging the aribtrator's award, so that no issue arises regarding the duty of fair reprsentation, then the concerns raised in DelCostello are largely absent. Though the circuits are split as to what limitations period is applicable, see Posadas, 873 F.2d at 482-84 (surveying the case law), the Ninth Circuit employs the state statute of limiations for challenges to arbitrators' decisions when unions seek to vacate them:

> The factors that led to the result in DelCostello have no parallel in the present case. [The union] does not claim that the arbitral process itself was flawed or distored by the commission of an unfair labor practice. It does not seek relief that could not have been obtained in the arbitration proceedings themselves. It has been represented by counsel from the beginning, and does not question the quality of the representation.

United Bhd. of Carpenters & Joiners Local 1020 v. FMC Corp., 724 F.2d 815, 815 (9th Cir. 1984). At the same time, applying the state limitations period promotes the speedy adjudication of workplace grievances. Posadas, 873 F.2d at 483.

Alaska statutory law applies a ninety-day limitations period for a party to apply to the superior court to vacate an arbitration award. See AS 09.43.120(c). However, AS 09.43.010-.180 will not apply to a labor-management contract unless the contract expressly incorporates these provisions or another statute provides for their application. AS 09.43.010. Because the contract between Mat-Maid and Local 959 contains no provision directing the application of AS 09.43.010-.180, a ninety-day limitations period is inapplicable. See, e.g., IBEW, Local Union 1547 v. City of Ketchikan, 805 P.2d 340, 342 (Alaska 1991); State v. Public Safety Employees Ass'n, 798 P.2d 1281, 1284-85 (Alaska 1990). We have consistently urged legislative action on this matter, because no time limit exists at common law for challenges to an arbitration award. See IBEW, Local Union 1547, 805 P.2d at 342 n.5; Public Safety Employees Ass'n, 798 P.2d at 1285 n.7. However, the legislature has not yet responded.

Patterson's appeal presents a less difficult

question. We must decide not the appropriate state limitations period for his action, but rather whether to apply a state limtations period or a federal one. Our determination turns upon our long-standing view that "the parties to an agreement reached through arbitration should be able to proceed to implement the agreement without worry that it is subject to challenge months or years in the future.," and that "[f]inality is an important consideration" in review of an arbitrator's decision. Public Safety Employees Ass'n, 798 P.2d at 1285 n.7; cf. City of Fairbanks Mun. Util. Sys. v. Lees, 705 P.2d 457, 459-60 (Alaska 1985) (holding that courts do not review the merits of an issue submitted to arbitration, because "arbitration should be a final and binding means of dispute resolution, not a mere prelude to litigation"). We also note that where an employee's § 301 challenge to an arbitrator's decision required a choice between a state's ninety-day limitations period for challenges to arbitrator's decisions and the same

state's six-year period for contract claims, the U.S. Supreme Court selected the shorter period, in part on the grounds that the system of industrial self-government, "with its heavy emphasis on grievance arbitration, and the 'law of the shop,' could easily become unworkable if a decision ... could suddenly be called into question as much as six years later." United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 58-59, 64 (1981).[15]

Taking the DelCostello and Mitchell decisions together, we hold that the statute of limitations for directly attacking the arbitrator's decision is the six-months period under federal law for hybrid § 301 claims. Patterson did not file his suit against the arbitrator's July 1986 award until 1988, well in excess of the six-months limitations period. We

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[15]The Mitchell court declined to reach the issue of whether to borrow a federal statute of limitations, because neither party raised the matter on appeal. Id. at 451 & n.2; see also DelCostello, 462 U.S. at 154 & n.2.

therefore conclude that Patterson failed to make timely his direct attack on the award.

B. Patterson's Defamation Claim

Patterson argues that there are genuine issues of material fact regarding an agreement not to re-publish Bevins' February 6, 1986 letter to Sinnett. Mat-Maid responds that the publication of the allegedly defamatory letter was privileged and that the privilege constitutes a complete defense.[16]

The Ninth Circuit has held that statements made by parties during the course of grievance proceedings conducted pursuant to the provisions of a collective bargaining agreement that is subject to the Labor Management Relations Act are absolutely privileged, as long as the statements are not published to individuals lacking legitimate interests in them:

> Federal labor policy promotes the collective bargaining process as a means of stabilizing the relationship between

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[16]Conceding that the State is immune from suit on the defamation claims, [At. R. Br. 6] Patterson pursues them against Mat-Maid alone.

> employers and employees. It is "an effort to erect a system of industrial self-government." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409 (1960). Grievance procedures established by the [collective bargaining agreement] are crucial to maintaining that system. "[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.... the processing of disputes through [that] machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." Id. at 581, 80 S.Ct. at 1352.
>
> To allow state defamation claims based on statements made in grievance proceedings would weaken the grievance system as a means of industrial self-government.

Hyles v. Mensing, 849 F.2d 1213, 1217 (9th Cir. 1988).

Patterson asserted in his complaints that Bevins' February 6, 1986 letter was published on three occasions: (1) on February 6, 1986, when Bevins sent the letter to Sinnett; (2) on June 23, 1986, when Mat-Maid introduced the letter into evidence at the arbitration proceeding; and (3) on certain unspecified dates and to unspecified recipients when "the contents of the letter [were] used when other employer[]s

requested information regarding Mr. Patterson." On appeal, Patterson failed to provide briefing about the third occasion; thus we consider this point waived. See Miles v. Miles, 816 P.2d 129, 133 (Alaska 1991). On the second occasion, publication clearly was privileged under Hyles. See 849 F.2d at 1217. However, the first occasion presents a more complex issue. The collective bargaining agreement on which Mat-Maid relies did not go into effect until April 1986, after Bevins sent Sinnett the letter. The agreement was in effect at the time of Patterson's termination and at the arbitration hearing. Patterson thus contends that the grant of summary judgment on the absolute privilege issue was improper because "Mat-Maid has failed to establish that any [agreement] was in effect at the time of the initial publication by Bevins to Sinnett."

Mat-Maid's summary judgment motion relied solely on the April 1986 collective bargaining agreement. However, the arbitrator's decision states that before the collective bargaining

agreement went into effect, Mat-Maid abided by an "employer implemented last offer agreement," which was dated November 18, 1983, and which Local 959 had never endorsed. Patterson did not address Mat-Maid's arguments at the summary judgment stage.

This evidence is sufficient for the summary judgment in favor of Mat-Maid to survive Patterson's appeal. If no union-management grievance resolution mechanism were in effect at all, then no need would have existed for Bevins' February letter to Local 959's representative. The implemented agreement clearly was a substitute for a collective bargaining agreement. The letter would constitute a type of informal grievance resolution, related to whatever agreement would be in force at the time of the actual termination and formal arbitration proceeding. Even though the letter from Bevins to Sinnett falls outside of formal grievance proceedings, its relationship with the grievance resolution process brings it within the scope of

the privilege. See General Motors Corp. v. Meridicki, 367 F.2d 66, 70 (10th Cir. 1966) (holding that absolute privilege extends to statements made in informal but customary conference, which occurred before formal hearing on the grievance, and which the bargaining agreement did not mandate); accord Hasten v. Phillips Petroleum Co., 640 F.2d 274, 276-77 (10th Cir. 1981); see also Green v. Hughes Aircraft Co., 630 F.Supp. 423, 427 (S.D. Cal. 1985) (allowing an absolute privilege for statements made to union representatives in a meeting prior to the initiation of disciplinary action). See generally Gary J. Spivey, Annotation, Libel and Slander: Privileged Nature of Communication to Other Employees or Employees' Union of Reasons for Plaintiff's Discharge, 60 A.L.R.3d 1081 (1974); Gary J. Spivey, Annotation, Libel and Slander: Privileged Nature of Communications Made in Course of Grievance or Arbitration Procedure Provided for by Collective

Bargaining Agreement, 60 A.L.R.3d 1041 (1974).[17]

IV. CONCLUSION

We AFFIRM the superior court's grant of summary judgment to Mat-Maid and the State on Patterson's wrongful termination claims. As for Patterson's § 301 collateral attack on the arbitrator's award, we conclude that it is barred by the applicable six-month period of limitations. Similarly, we conclude that Patterson's direct attack on the arbitrator's award was untimely and thus was barred.

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[17]In regard to Bevins' sending the February 6, 1986 letter to Sinnett in his capacity as an officer of Local 959, the collective bargaining agreement provides:

> Any dispute that arises between teh employee and the Employer or any complaint or grievance on the part of both or one, said grievance, complaint, or dispute shall be submitted to the Local Union within thirty (30) days to be eligible to receive the assistance of the Local Union.

Given this provision, Bevins' letter to Sinnett can fairly be viewed as a publication in connection with "'the entire proceeding contemplated by the provisions of the agreement for the grievance machinery,'" Green, 630 F.Supp. at 427 (quoting Hasten, 640 F.2d at 277), and thus is absolutely privileged.

We AFFIRM the superior court's grant of summary judgment to Mat-Maid on Patterson's defamation claims, since on the two occasions when Bevins' February 6, 1986 letter was published, such publication was absolutely privileged.

AFFIRMED.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

WILLIAM L. PATTERSON,

Plaintiff,

vs.

STATE OF ALASKA, DEPT. OF AGRICULTURE, Individually and Severally; MATANUSKA MAID, INC., Individually and Severally; and its agents JOHN SEAWELL, RON WILDE, and STEVE BEVINS, Individually and Severally,

Defendants.

Case No. 3AN-88-1093 Civil

WILLIAM L. PATTERSON,

Plaintiff,

vs.

STATE OF ALASKA, DEPT. OF AGRICULTURE, Individually and Severally; MATANUSKA MAID, INC., Individually and Severally, and its agents JOHN SEAWELL, RON WILDE, STEVE BEVINS and JOE VAN TREECK, Individually and Severally; and the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Individually and Severally; and THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 959, Individually and Severally, and its agents ROBERT J. SINNETT and EDWARD R. CONYERS, Individually and Severally, and JERRY THORN dba JERRY THORN, Arbitrator, Individually and Severally,

Defendants.

Case No. 3AN-88-4692 Civil

FINAL JUDGMENT

THIS MATTER having come on before the above-entitled Court on defendants Matanuska Maid, Inc., John Seawell, Steve Bevins, Ron Wilde, and Joe Van Treeck's Motion for Final Judgment the Court having entered an Order Granting Motion for Summary Judgment on June 19, 1989, and being otherwise fully advised of the premises; NOW, THEREFORE,

IT IS HEREBY ADJUDGED AND ORDERED:

1. Summary Judgment is entered in favor of Matanuska Maid, Inc., John Seawell, Ron wilde, Steve Bevins, and Joe Van Treeck, dismissing all claims against them in the above-captioned consolidated matters;

2. Matanuska Maid, Inc., John Seawell, Ron Wilde, Steve Bevins, and Joe Van Treeck are awarded judgment against plaitniff William L. Patterson for attorneys' fees in the amount of $_____ and costs in the amount of $_____.

3. This judgment shall bear interst at the rate of 10.5 percent per annum from the date entered until paid in full.

DONE this 10th day of August, 1989, at Anchorage, Alaska.

K. L. HUNT
The Honorable Karen Hunt
Judge of the Superior Court

Parry Grover
Gina M. Zadra
DAVIS WRIGHT & JONES
550 W. 7th Avenue, Suite 1450
Anchorage, AK 99501
(907) 276-4488

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

WILLIAM L. PATTERSON, Plaintiff, vs. MATANUSKA MAID, INC. Individually and Severally and its agents JOHN SEAWELL, RON WILDE, and STEVE BEVINS, Individually and Severally, Defendants.	Case No. 3AN-88-1093 Civil
WILLIAM L. PATTERSON, Plaintiff, vs. MATANUSKA MAID, INC., Individually and Severally, and its agents JOHN SEAWELL, RON WILDE, STEVEN BEVINS and JOE VAN TREECK, Individually and Severally and THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 959, Individually and Severally, and its agents ROBERT J. SINNETT and EDWARD R. CONYERS, Individually and Severally, and JERRY THORN dba JERRY THORN, Arbitrator, Individually and Severally,	Case No. 3AN-88-4692 Civil ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendants.)

THIS MATTER having come on before the above-entitled Court on defendants Matanuska Maid, John Seawell, Ron Wilde, Steve Bevins and Joe Van Treeck's Motion for Summary Judgment; the Court having reviewed defendants' Motion and Memorandum in of Support Motion for Summary Judgment, the Affidavit of Gina M. Zadra, the Affidavit of Steve Bevins, the Affidavit of John Seawell, and the Affidavit of Robert J. Sinnett, and the pleadings and record herein, and being otherwise fully advised of the premises; NOW THEREFORE

IT IS HEREBY ORDERED that Summary Judgment is granted in favor of Matanuska Maid, Joe Van Treeck, Ron Wilde, Steve Bevins and John Seawell.

Done this 19 day of June, 1989.

K. L. HUNT
The Honorable Karen Hunt
Judge of the Superior Court